

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

**MEMORANDUM OPINION**

(January 15, 2003)

On December 16, 2002, the Commonwealth of Massachusetts (“Massachusetts”) and the State of West Virginia (“West Virginia”) (collectively “Movants”)<sup>1</sup> filed a Motion for Attorneys’ Fees and Expenses and a Motion to Hold in Abeyance Proceedings on the Fee Petitions. This Memorandum Opinion addresses the latter motion, and considers that Motion, Microsoft’s Opposition, two telephonic hearings incorporated into the record, and the relevant law.

Movants suggest that “[h]olding the fee proceedings in abeyance will serve the interests of justice and judicial economy by avoiding multiple or duplicative proceedings before this Court on fees applications, the amount of which could be affected by the pending appeal.” Motion to Hold in Abeyance (“Mot.”) at 2 ¶ 4. The fact that Microsoft intends to oppose Movants’ Motion for fees, Movants contend, will lead to “protracted proceedings on fees [that] will necessarily divert the States’ resources and distract the States from the underlying litigation, *i.e.*, the appeal.”

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<sup>1</sup> Movants have appealed this Court’s November 1, 2002 Final Judgment in the above-captioned case.

*Id.* at 3 ¶ 5.

Microsoft opposes holding the Motion for Fees in abeyance. Microsoft notes that the Federal Rules encourage litigating fees “in the normal course,” and the practical advantages of doing so when the parties are “well suited and well staffed . . . with material facts fresh in their minds, thus rendering a more accurate and reliable record and decision.” Microsoft Opposition to Motion to Hold in Abeyance Proceedings on the Fee Petitions (Microsoft Opp’n) at 2 ¶ 3. Microsoft also maintains that courts that do hold fee determinations usually do so when liability is uncertain, a situation that is inapposite here as the Circuit Court of Appeals has already determined the liability in this case, *id.* at 3-4 ¶ 5, or when both parties request or consent to the abeyance, *id.* at 5-6 ¶ 9.

After reviewing Movants’ Motion, Microsoft’s Opposition, the relevant law, and conducting two telephonic hearings on the matter at the request of the parties which are incorporated into the record, the Court shall deny Movants’ Motion to Hold in Abeyance Proceedings on the Fee Petitions.

## **I. DISCUSSION**

The Court’s inquiry is guided by Rule 54(d)(2)(B) which discusses how a party should file its Motion for Attorney’s Fees.<sup>2</sup> Our Local Rules provide that “[a]fter a decision has been

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<sup>2</sup> The Rule provides:

Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

Fed. R. Civ. P 54(d)(2)(B).

made that there will be an appeal, the court shall make a specific determination as to whether, in the interest of justice, the fee issues, in whole or in part, should be considered or be held in abeyance pending the outcome of the appeal.” LCvR 54.2(b). This procedure is no longer mandatory since the adoption of the 1993 Amendments to Rule 54(d)(2) of the Federal Rules of Civil Procedure. *See* Comment to LCvR 54.2. This Circuit has commented that

from the appellate court’s perspective, it would be desirable if the merits appeal and the appeal from the final order on fees could be decided together. Indeed, this appears to be the import of the 1993 amendments to the civil and appellate rules.

*Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 680 n.5 (D.C. Cir. 1996) (citations omitted). The Court agrees and finds that the circumstances of this case counsel proceeding immediately with the attorneys fees phase so that the Court of Appeals might deal with any attorneys fees issue that is appealed along with the merits appeal in this case.

Weighing in favor of the Court’s determination is the fact that liability in this case has already been established by the Court of Appeals. *See United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). Therefore, the pending appeal in this case will not result in a reversal in the finding of liability. Given this state of affairs, proceeding on attorneys fees matter does not risk a waste of judicial resources.

Furthermore, Microsoft has not filed a cross-appeal, so the only question the Court of Appeals will consider is whether this Court’s remedy should be broadened. Therefore, there is little risk a decision by the Court of Appeals would require Movants to refund fees awarded by this Court’s attorneys fees determination.

Lastly, the Court finds that it is generally prudent to proceed with the attorneys fees phase of a case when the issues are fresh in the minds of the litigants and the Court. Based on the other

circumstances of this case, the Court does not discern the advantage to waiting until the Court of Appeals rules on Movants' appeal of the Final Judgment before addressing their attorneys fees claims.

Given this state of affairs, the Court determines that it shall deny Movants' Motion and proceed with the Fee Petitions in a prompt manner, and adopt the proposed schedule of the parties.

## **II. CONCLUSION**

For the foregoing reasons, the Court shall deny Movants' Motion to Hold in Abeyance Proceedings on their Fee Petitions. An order accompanies this memorandum opinion, which also sets out the discovery schedule for the attorneys fees phase of this case.

January 15, 2003

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COLLEEN KOLLAR-KOTELLY  
United States District Judge